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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 3

WILLIAM ALBERTSON and ROSCOE QUINCY PROCTOR,
Petitioners,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR PETITIONERS (1) REPLYING TO RESPONDENT'S OPPOSITION TO PETITION FOR CERTIORARI AND (2) OPPOSING RESPONDENT'S SUGGESTION THAT THE CAUSE IS MOOT WITH REGARD TO PETITIONER ALBERTSON

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REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR CERTIORARI

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1. The Privilege Issue and Prematurity

Contrary to its position in the court below (Pet. 7), the government argues (Opp. 5) that "until the order in this case becomes final," petitioner's claim of his privilege against self-incrimination "is premature be-

cause petitioner is not yet under the compulsion of the criminal laws to register."[1]

As soon as the registration order against petitioner becomes final, without any waiting period, petitioner must register or subject himself to imprisonment of five years and a fine of $10,000 for each day of failure to register (Act, sec. 15(a)). Accordingly, if this Court, like the court below, refuses to adjudicate petitioner's claim of privilege—conceded by the lower court to be "not without force" (Pet. Appdx. A, p. 24)—petitioner can reassert and relitigate his privilege only by risking a lifetime of imprisonment. To force petitioner and others similarly situated to engage in such a desperate gamble for the vindication of their constitutional privilege makes the Fifth Amendment an unkept promise.

No such situation was present in *Communist Party* v. *S.A.C.B.*, 367 U.S. 1. As shown by the passage from that decision quoted in the Opposition (p. 4), adjudication of the privilege of the Party's officers was there held premature because, "We cannot know now that the Party's officers will ever claim the privilege." Here, in contrast, the individual who may be entitled to the privilege has personally claimed it, as the government admits (Opp. 5), and his claim has been rejected (Pet. 7-8).

Whether the prematurity holding of the *Party* case, made by a bare majority, should be extended to the different circumstances here present is itself an important, substantial constitutional question which should be decided by the Court.

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[1] The government's Opposition refers only to petitioner Proctor because it has suggested that petitioner Albertson's case has become moot. Our Opposition to the suggestion follows this Reply.

2. The Merits of the Privilege Claim

The government argues (Opp. 6-7) that "registration could not incriminate petitioner" because of the conjunction of two factors: (a) section 4(f) of the Act prohibits the "fact of registration" from being received in evidence against the registrant in specified criminal prosecutions, and (b) The "Attorney General already had reason to believe that petitioner was a Party member," so that "the mere fact of registration could not provide the Attorney General with any new leads."

In the Communist Party's appeal from its conviction for failing to register under the Act, the government made the identical argument in asserting that the Party's officers could not incriminate themselves by registration. The Court of Appeals, reversing the conviction, rejected the argument, and this Court denied the government's petition for certiorari. *Communist Party* v. *United States,* 331 F. 2d 807, 813, cert. den. 377 U.S. 968, sub nom. *United States* v. *Communist Party.*[2] It is beyond our comprehension how the government can contend that its rejected argument demonstrates that petitioner's Fifth Amendment claim does not present a substantial question on its merits.

For 72 years this Court has asserted that a limited immunity statute like section 4(f) cannot supplant the privilege in a federal proceeding because it does not

[2] The government's petition for certiorari in that case (No. 1027, Oct. Term, 1963, p. 2) included the following as a Question Presented: "2. Whether the Party's officers may, under the Fifth Amendment, refuse to register for the Party when they cannot possibly incriminate themselves because the statute prohibits any information obtained by registration from being introduced in evidence in a judicial proceeding and no new leads to other information can result since Party officers have publicly stated their positions."

accord a protection coextensive with the privilege. *Counselman* v. *Hitchcock,* 142 U.S. 547; *Brown* v. *Walker,* 161 U.S. 591, 594-95; *Hale* v. *Henkel,* 201 U.S. 43, 67; *United States* v. *Monia,* 317 U.S. 424, 428; *Smith* v. *United States,* 337 U.S. 137, 147; *United States* v. *Bryan,* 339 U.S. 323, 336; *Adams* v. *Maryland,* 347 U.S. 179, 182; *Scales* v. *United States,* 367 U.S. 203, 210. No case has said that an exception exists if the government already has "reason to believe" the existence of the incriminating fact, nor has any court, in applying *Counselman,* inquired into the information possessed by the government. To the contrary, the Court has applied the rule so as to vindicate claims of privilege, despite statutes of the 4(f) type, even though the record showed that the government already had the information which it sought to elicit from the witness. See, e.g., *Emspak* v. *United States,* 349 U.S. 190, 200. Moreover, if the government's suggested exception were the law, the existence of a limited immunity statute would prevent persons from knowing when they could rightfully claim their privilege, since the right would depend on facts outside their knowledge, what the government has "reason to believe" about them.

We believe that the government is mistaken in supposing (Opp. 6) that the *Counselman* doctrine was devitalized *sub silentio* by *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (see Pet. 10, ftn. 6). But if there is any basis for the government's supposition, surely the question is a substantial one which needs to be decided by the Court.

In any event, the government's proposed revision of the *Counselman* rule is not applicable to the present case.

First, the government's evidence and the Board's findings as to petitioner Proctor's membership in the Communist Party related to past membership.[8] Yet the Board's order, if it becomes final, will require him to make by self-registration the incriminating admission of Communist Party membership in the present, at a time several years later than the period to which the evidence and the findings relate (see Act, sec. 8(a); Registration Form 15-52a, Pet. Appdx. C, p. 39).

Second, section 4(f) does not preclude all evidentiary use of the incriminating statements made by registration. As our Petition pointed out (p. 10), section 4(f) by its terms does not protect a registrant against the receipt in evidence of the registration documents (1) to prove incriminating admissions in the documents other than the admission of Communist Party membership or officership, and (2) to prove the registrant's Communist Party membership in criminal prosecutions for violating the employment or labelling provisions of sections 5 and 10 of the Act. The government says of the second branch of this point (it overlooks the first) that section 4(f) should applied to prosecutions for violations of sections 5 and 10 because "the purpose of Section 4(f) was to meet criticism that the Act might be unconstitutional under the Fifth Amendment" (Opp. 7). But as *Scales* v. *United States*, 367 U.S. 203, 216, points out, the proponents of the Act took a "narrow view of the self-incrimination problem," and the legislative history (*Scales* at 211-219) shows that Congress was niggardly in the immunity it

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[8] The latest activity relied on by the Board as evidence of Proctor's Communist Party membership was in March 1962 (R. 44-49). The latest such activity in petitioner Albertson's case was in July 1962 (R. 16-24).

was willing to extend to registrants despite repeated warnings that its action would be constitutionally insufficient. Hence there is here no more basis than in *Scales* for extending section 4(f) beyond its language.

Third, if the registration order becomes final, petitioner will be obliged further to incriminate himself by answering the questions on the "Registration Statement" (Form IS-52, Pet. Appdx. C, p. 40), as well as by executing the "Registration Form" (Form IS-52a, Pet. Appdx. C, p. 39). The government claims (Opp. 7) that only some of the questions on the Statement call for possibly incriminating information. But the fact is that except for petitioner's name, which the government already knows, every item on the Registration Statement calls for a potentially incriminating answer.[4]

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[4] The Registration Statement calls for all names used by the registrant in the previous ten years and for the Party offices which he held in the preceding year. Such information is obviously incriminating and indeed is sought for no other purpose. The date and place of the registrant's birth is identifying information which, especially in combination with the demand for aliases, can be used to link the registrant with claimed criminal conduct. If the registrant is an alien or naturalized citizen the information as to nativity may also be used to support efforts to deport or denaturalize him. Finally, the Registration Statement, like the Registration Form, requires an admission that the Communist Party is a Communist-action organization. Since by definition (Act, secs. 2 and 3(3)), such an organization is a participant in an international criminal conspiracy, that admission is plainly incriminating under section 4(a) of the Act and the Smith Act. The government's statement (Opp. 7 ftn. 5) that a "registrant does not admit that the organization to which he belongs is a Communist-action organization" is belied by the plain language of the registration documents and of section 8(a).

3. The First Amendment and Substantive Due Process

Communist Party v. *S.A.C.B.*, 367 U.S. 1, 88-105, held that section 7(d) of the Act, requiring a Communist-action organization to file its membership list with the Attorney General, does not violate the First Amendment. The case recognized that the members had a First Amendment interest in preserving the privacy of their political association, but held this interest outbalanced by the government's security interest in obtaining the disclosure.

As we pointed out (Pet. 11), the government has no such interest in ordering members to register themselves following Board hearings. In those cases, identification of the person as a member and disclosure of his membership are accomplished by the Board's findings. Accordingly, compulsory self-identification of a member by registration thereafter is superfluous to any disclosure objective and is a purposeless exaction of self-defamation and submission to a government-prescribed viewpoint (Pet. 12-13).

The government's Opposition is unable to suggest any governmental purpose which can be served by requiring a member to register, and thereby degrade, himself after the Board has found and disclosed his membership. Instead, the government is oblivious to the issue. It asserts that the holding in the *Party* case "fully applies" (Opp. 11-12), while ignoring the key distinction that Party registration serves a disclosure function whereas member registration does not.

4. Denial of Judicial Trial and Procedural Due Process; Attainder

(a) The government is similarly unresponsive to our contention (Pet. 17-18) that the Act unconstitutionally denies petitioner a trial by jury and a judicial trial on two issues: (a) whether the Communist Party is a Communist-action organization and (b) whether petitioner is a member of the Party.

The government first says (Opp. 5-6) that the contention is premature and must await adjudication in a criminal prosecution for non-compliance with the registration order.[5] But the government studiously ignores our argument (Pet. 17-18) that under the doctrine of *Ex Parte Young,* 209 U.S. 123, petitioner is constitutionally entitled to adjudicate his claims in a civil proceeding before incurring the enormous cumulative criminal penalties which the Act visits on those who violate a registration order.

On the merits of the point, the government professes to see no distinction between the situation here and standard procedure for enforcing administrative orders (Opp. 8). The government overlooks the critical differences, thereby avoiding the necessity of dealing with *United States* v. *Spector,* 343 U.S. 169, 174 *et seq.,* and *Wong Wing* v. *United States,* 163 U.S. 288 (cited Pet. 17). The order here is an exercise of adjudicative, as distinguished from rule-making, power. It is enforced by criminal penalties for non-compliance, not by a civil procedure as with orders of the Federal Trade or Interstate Commerce Commis-

[5] The government makes this statement only with regard to the first of the two issues mentioned in the preceding paragraph. It fails or refuses to recognize that our contention also applies to the second issue.

sion. As shown by Justice Jackson's opinion in *Spector* and by *Wong Wing*, a finding made in an administrative adjudicative proceeding may not be made conclusive in a criminal proceeding for violation of the administrative order, where the finding is, as here (Pet. 32), a constitutional prerequisite to the validity of the order. Thus the government acknowledges a fatal flaw when it agrees (Opp. 8) that in a criminal prosecution for failure to register the defendant will be bound by the Board's determination of the character of the Communist Party. A like flaw exists in the fact that the defendant will also be bound by the Board's administrative determination that he is a member of the Party.

(b) Petitioner was also held bound in the Board proceeding itself by the Board's prior determination that the Communist Party is a Communist-action organization. We argued (Pet. 14-16) that this preclusion of petitioner is unconstitutional because (a) the determination was made in a proceeding to which petitioner was not a party, and (b) the Board determination related to 1953, whereas petitioner was bound as to the character of the Party in 1962. The government concedes that this point is not premature (Opp. 6, ftn. 4) and admits (Opp. 8-9) that petitioner was so bound.

The government argues (Opp. 9) that this procedure "is not so unfair as to violate due process" (Opp. 10) because "the Communist Party may be fairly said to have represented its members" (Opp. 9). The government cites *Hansberry* v. *Lee*, 311 U.S. 32, 42-43, and *Restatement, Judgments* (1942) § 86, which state that a judgment in an action which meets the requirements for class actions may, consistently with due process, bind all the members of the class. The proceedings

against the Party, however, lacked all the essentials of a class action. It was not brought against the Party as the representative of its members, nor were any members joined to represent the class; the Party did not purport to defend the proceeding on behalf of the members; and nothing in the Act or the Board's rules would have permitted a member to participate in the proceeding by intervention or otherwise. See *Restatement, Judgments,* at 418; Fed. Rules Civ. Proc. 23, 24.

Even if the *Party* case had been a class action, there would still be the problem that what was there decided was the nature of the Party in 1953, whereas petitioner was precluded as to the Party's nature in 1962. The government considers this circumstance reasonable, stating (Opp. 10) that the Act provides "a means by which the Communist Party itself can relitigate its status." But the government ignores the facts, pointed out in our Petition (p. 15), that the Act does not permit an unregistered organization to relitigate its status and that the Communist Party, asserting constitutional rights not disposed of in the prior litigation against it, has not registered.

OPPOSITION OF PETITIONER ALBERTSON TO SUGGESTION THAT THE CAUSE IS MOOT WITH REGARD TO HIM

Petitioner Albertson has instructed counsel to oppose the government's suggestion that the cause is moot as regards him.

The government quotes an announcement in *The Worker* of July 7, 1964, that the New York State Communist Party expelled Mr. Albertson on the ground that he "has operated as a police agent within the ranks of the party." It represents that from this

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article and other, undisclosed information, the government is satisfied that Mr. Albertson is "no longer a 'member'" of the Communist Party, so that "the factual basis of the order to register, which has not yet become final, has been eliminated."

Mr. Albertson has heretofore, in the exercise of his privilege against self-incrimination, refused to admit or deny membership in the Communist Party. Since he wishes to preserve his claim of privilege, he obviously cannot comment herein on the accuracy of the government's representation that he is "no longer" a member of the Communist Party. Mr. Albertson does, however, categorically deny that he is or ever has been a police agent or informer.

If Mr. Albertson has been expelled by the New York State Communist Party, that would not moot his case for three reasons.

(a) Under the national Constitution of the Communist Party, a member who has been expelled by his State organization has a right to appeal to the National Committee of the Party and thence to the National Convention. The government does not assert that this appeal procedure has been exhausted.

(b) The Act does not contemplate that a person who has been ordered to register as a member of the Communist Party is relieved of the registration obligation by a termination of his membership before the order becomes final. On the contrary, the liability to register does not depend on whether the individual is or ever was a member of the Communist Party. It depends only on whether the Board found him to be a member at the time of the administrative proceeding, and, if the case is taken to judicial review, whether the finding is supported by a preponderance of the evidence. Ob-

viously a finding can be so supported and still be contrary to fact.

In short, "the factual basis of the order to register" is not Party membership but a finding of such membership, and the finding is always of membership at a time preceding the registration. This "factual basis" has not been eliminated as to petitioner Albertson, whether or not he is presently a member of the Communist Party.

Absent publication of an expulsion in The Worker, the government would be the first to reject a request that a registration order be vacated because the individual is no longer, or never was, a member of the Communist Party. And we doubt that the government would have taken its present position if the expulsion announcement had come after this case were over so that considerations of litigation strategy would not be present.

(c) Petitioner Albertson has challenged the member registration provisions of the Act on the grounds that they invade his constitutional rights. If he was once but is not now a member, nevertheless the Act's provisions make it dangerous for him to seek reinstatement and thus continue to interfere with his freedom of choice and the exercise of his constitutional right of association.

Respectfully submitted,

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